

ST 98-24

Tax Type: SALES TAX

Issue: Interstate Sales (Non-Verified)

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS

THE DEPARTMENT OF REVENUE)	
OF THE STATE OF ILLINOIS)	
)	Docket No.
v.)	IBT #
)	NTL #
JOHN DOE d/b/a)	NTL #
ABC CORPORATION)	
Taxpayer)	

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; David Reid of Reid & Jones Law Office for JOHN DOE d/b/a ABC CORPORATION.

Synopsis:

The Department of Revenue (“Department”) conducted an audit of the business known as ABC CORPORATION, which was operated by JOHN DOE (“taxpayer”). At the conclusion of the audit, the Department issued two Notices of Tax Liability (NTLs) to the taxpayer; he timely protested the NTLs. An evidentiary hearing was held during which the taxpayer presented the following issues: (1) whether the taxpayer provided sufficient documentation to substantiate that certain sales were tax-exempt; (2) whether the taxpayer is entitled to a credit for retailers’ occupation taxes (ROT) that he paid to Illinois but should have paid to another state; (3) whether the taxpayer is entitled to an

abatement of the penalties due to reasonable cause. After reviewing the record, it is recommended that this matter be resolved partially in favor of the taxpayer and partially in favor of the Department.

FINDINGS OF FACT:

1. The taxpayer was the owner and operator of a store known as ABC CORPORATION located in FICTITIOUS CITY, Illinois. (Tr. p. 31)

2. The taxpayer sold various items of furniture to customers from Illinois, Missouri, and Iowa. His employees often delivered furniture to customers in the three states. (Tr. pp. 32-33)

3. The taxpayer's sales/receipts journal indicated whether a delivery was made outside of Illinois. (Tr. pp. 11-12, 38-39, 73)

4. The Department audited the taxpayer's business for the periods from January 1, 1992 to November 30, 1993 and December 1, 1993 to December 31, 1994. (Dept. Group Ex. #1)

5. The auditor reviewed the sales journal to determine which items were claimed by the taxpayer as interstate sales. The auditor asked the taxpayer for documentation to verify that the items were actually delivered out-of-state. (Tr. pp. 9-11)

6. For some of the sales, either the taxpayer could not locate an invoice or the auditor determined that the invoice did not fully indicate what took place. For each audit period, the auditor listed the items for which the taxpayer did not have sufficient documentation on a document entitled "Global Taxable Exceptions." (Taxpayer Ex. B, C; Tr. p. 12)

7. At the hearing the taxpayer presented invoices verifying that an out-of-state delivery was made to JANE DOE on March 2, 1993 and JIM & MARY DOE on March 12, 1993. (Taxpayer Ex. D-1, D-3)

8. The taxpayer presented an invoice verifying that an out-of-state delivery was made to RON DOE in the amount of \$2,272.00. The taxpayer did not provide documentation indicating that the remaining \$724 on the invoice is exempt from taxation. (Taxpayer Ex. D-4)

9. The invoice for the sale made to DON DOE does not sufficiently verify that the item was delivered out-of-state. (Taxpayer Ex. D-2)

10. The taxpayer did not present documentation substantiating that the remaining items on the Global Taxable Exceptions are exempt from taxation.

11. The taxpayer also provided invoices indicating that tax was collected and paid to Illinois but should have been collected and paid to Missouri or Iowa. The taxpayer did not refund this tax to his customers. (Taxpayer Ex. F-1 through F-15; Tr. pp. 54, 68)

12. On August 10, 1995, the Department prepared two corrected returns for the taxpayer. The one for the first audit period shows tax due in the amount of \$19,718, plus a penalty of \$1,972. The corrected return for the second audit period shows tax due of \$11,145, plus a penalty of \$1,672. The corrected returns were admitted into evidence under the certification of the Director of the Department. (Dept. Group Ex. #1).

CONCLUSIONS OF LAW:

The Retailers' Occupation Tax Act ("ROTA") (35 ILCS 120/1 *et seq.*) imposes a tax upon persons engaged in the business of selling at retail tangible personal property.

35 ILCS 120/2. Sections 4 and 5 of the ROTA provide that the certified copy of the corrected return issued by the Department "shall be prima facie proof of the correctness of the amount of tax due, as shown therein." 35 ILCS 120/4, 5. Once the Department has established its *prima facie* case by submitting the corrected return into evidence, the burden shifts to the taxpayer to overcome this presumption of validity. A.R. Barnes & Co. v. Department of Revenue, 173 Ill.App.3d 826, 832 (1st Dist. 1988). To prove its case, a taxpayer must present more than its testimony denying the accuracy of the Department's assessment. Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill.App.3d 203, 217 (1st Dist. 1991). The taxpayer must present sufficient documentary evidence to support his claim. Id.

The taxpayer argues that he does not owe ROT on various items listed on the Global Taxable Exceptions because they were tax-exempt sales. He claims that he has provided sufficient documentation to show that four of the sales qualify for the interstate commerce exemption. (See 35 ILCS 120/2-60) The Department's regulation concerning sales of property to out-of-state customers provides in part as follows:

"The [ROT] tax does not extend to gross receipts from sales in which the seller is obligated, under the terms of his agreement with the purchaser, to make physical delivery of the goods from a point in this State to a point outside this State, *** provided that such delivery is actually made." 86 Ill.Admin.Code, ch. 1, §130.605(b)

The regulations further provide that in order to establish that gross receipts are exempt on the basis of out-of-state deliveries, the seller is required to retain proof that there was such an agreement and a bona fide delivery outside this state.

Of the four invoices presented, three of them are sufficient to substantiate interstate commerce exemptions. Two of the invoices, Exhibits D-1 and D-3, indicate

that delivery was made in Missouri of the items listed on the invoices. Although Exhibit D-2, which shows a sale on March 9, 1993 to DON DOE for \$299.00, includes a Missouri address and Missouri tax, nothing on the invoice indicates that delivery was made in Missouri. The fourth invoice is for a sale to RON DOE on March 29, 1993 for a total of \$2,996. The invoice has the following words written on it: "Customer has picked up above circled items." The items that are circled on the invoice total \$724.00. The remaining items, which total \$2,272.00, are entitled to the exemption.

In addition to the interstate commerce exemption, the taxpayer claims that the other items on the fourth invoice, Exhibit D-4, are exempt because they were purchased by a hospital. As previously stated, RON DOE is the purchaser shown on the invoice. Although the taxpayer claims that this person purchased the items on behalf of a hospital, the taxpayer has not provided an exemption number pursuant to section 2-5(11) of the ROTA (35 ILCS 120/2-5(11)) or any other documentation to support this claim. Therefore the \$724 is not exempt on this basis.

Next, the taxpayer argues that he is entitled to a credit for ROT that he paid to Illinois but should have paid to another state. Section 2-40 of the ROTA provides in relevant part as follows:

"If a seller collects an amount (however designated) that purports to reimburse the seller for retailers' occupation tax liability measured by receipts that are not subject to retailers' occupation tax, *** the purchaser shall have a legal right to claim a refund of that amount from the seller. If, however, that amount is not refunded to the purchaser for any reason, the seller is liable to pay that amount to the Department." (35 ILCS 120/2-40)

The purpose of this provision is to prevent unjust enrichment of the seller. Acme Brick and Supply Co. v. Department of Revenue, 133 Ill.App.3d 757, 765 (2nd Dist. 1985).

In this case, the taxpayer presented several invoices showing sales for which tax was paid to Illinois but should have been paid to another state. The taxpayer admitted that he did not refund any of this tax to his customers. (Tr. p. 68) Because he did not reimburse his customers, under section 2-40 he is not entitled to a credit for the tax erroneously paid to Illinois.

Finally, the taxpayer has asked that the penalties be abated. The penalties may be abated if the taxpayer shows that the failure to file the returns or pay the taxes was due to "reasonable cause." (35 ILCS 735/3-9) The most important factor to consider in determining whether to abate the penalty is the extent to which the taxpayer made a good faith effort to determine his proper tax liability and to file and pay his proper liability in a timely fashion. (See 86 Ill.Admin.Code, ch. 1, §700.400(b)) In this case, the taxpayer contacted the Department for information in an effort to accurately pay his tax liabilities to the various states in which he did business. He also instructed his staff concerning the methods necessary to properly record and pay his tax liabilities. It is therefore recommended that the penalties be abated.

Recommendation:

For the foregoing reasons, it is recommended that the Global Taxable Exceptions be reduced by the following amounts: \$193.95 for the delivery made to JANE DOE on March 2, 1993; \$1,138.00 for the delivery made to JIM AND MARY DOE on March 12, 1993; and \$2,272.00 for the delivery to RON DOE on March 29, 1993. It is further

recommended that the penalties be abated and the remaining portion of the assessments be upheld.

Linda Olivero
Administrative Law Judge